STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 23, 2009
v	No. 282285 Wayne Circuit Court
DALSHAN KENDRICK PEACOCK, Defendant-Appellant.	LC No. 07-007855-FC

Before: Beckering, P.J., and Talbot and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for first-degree home invasion, MCL 750.110a(2). The trial court sentenced defendant to 95 months to 20 years in prison. Defendant argues on appeal that he should not have been assessed points for offense variables 1, 2, 3, 10, 14, and 19, and therefore, resentencing is required. With the exception of OV 14, which the prosecution concedes should not have been scored, we disagree, and affirm.

The interpretation of statutory sentencing guidelines is reviewed de novo. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). An appellate court must affirm a sentence that is within the appropriate guidelines range unless there is "an error in scoring the sentencing guidelines or reliance on inaccurate information in determining the sentence." *Id*. "Scoring decisions for which there is any evidence in support will be upheld." *Id.* Thus, this Court reviews the scoring to determine "whether the trial court properly exercised its discretion and whether the evidence adequately supported a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). Findings of fact at sentencing are reviewed for clear error. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008).

"The sentencing court determines a defendant's minimum sentence range by considering together the OVs, the PRVs [prior record variables], and the offense class." MCL 777.21(1); *People v McCuller*, 479 Mich 672, 684; 739 NW2d 563 (2007). "Resentencing is an appropriate remedy where a defendant's sentence is based on an inaccurate calculation of the sentencing guidelines range and, therefore, does not conform to the law." *People v Underwood*, 278 Mich App 334, 337; 750 NW2d 612 (2008).

Defendant first argues that the trial court committed error when it assessed him points under OVs 1, 2, and 3, because the jury acquitted defendant of the additional homicide charge. "OV 1 assesses points for the aggravated use of a weapon." MCL 777.31; *People v Morson*, 471

Mich 248, 256; 685 NW2d 203 (2004). Defendant received 25 points because "[a] firearm was discharged at or toward a human being . . . ." MCL 777.31(1)(a). "OV 2 addresses the lethal potential of a weapon possessed or used by a defendant during the commission of the offense." *People v Young*, 276 Mich App 446, 451; 740 NW2d 347 (2007). Defendant received five points for possessing a pistol. MCL 777.32(1)(d). Finally, "OV 3 assesses points for physical injury to a victim." MCL 777.33; *Morson*, *supra* at 256. Defendant was assessed 100 points because "[a] victim was killed." MCL 777.33(1)(a). In fact, if defendant had been convicted of the homicide, he could *not* have been assessed points under OV 3. MCL 777.33(2)(b). Generally, however, scoring decisions are upheld if there is *any* evidence in the record to support them. *Endres*, *supra* at 417. See also MCL 769.34(10). The evidence presented showed that a home invasion occurred in the early morning hours of January 11, 2007, during which Cressie Horne was shot and killed as he lay in bed with his wife and child at their home on Pacific Street in Detroit. Testimony from a jailhouse informant indicated that defendant participated in the home invasion, possessed a weapon, and did the shooting. Therefore, there was evidence to support the trial court's scoring decisions.

Defendant contends, however, that the trial court improperly considered conduct for which defendant was acquitted. Defendant specifically asserts that a judge may not find facts by a preponderance of the evidence to impose a sentence not supported by the jury's verdict citing both *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and *Apprendi v New Jersey* 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000). Under Michigan law, however, "a sentencing court does not violate *Blakely* principles when it engages in judicial fact-finding to score the OVs in order to calculate a defendant's recommended minimum sentence range under the sentencing guidelines." *McCuller*, *supra* at 676. Thus, the trial court can consider all evidence presented at trial when calculating scores under the guidelines. *People v Dewald*, 267 Mich App 365, 380; 705 NW2d 167 (2005) abrogated in part on other grounds in *People v Melton*, 271 Mich App 590; 722 NW2d 698 (2006). The evidence considered may include but is not limited to "the contents of a presentence investigation report, admissions made by a defendant during a plea proceeding, or testimony taken at a preliminary examination or trial." *People v Ratkov*, 201 Mich App 123, 125; 505 NW2d 886 (1993). The sentencing court may also consider evidence inadmissible at trial. *People v Watkins*, 209 Mich App 1, 5-6; 530 NW2d 111 (1995).

Defendant further argues that he should not be assessed points under OVs 1, 2, and 3 because no other offenders had been assessed points. "Each multiple offender provision states that if one offender is assessed points under the variable, 'all offenders shall be assessed the same number of points.'" *Morson*, *supra* at 259, citing MCL 777.31(2)(b), MCL 777.33(2)(a) (OVs 1 and 3). OV 2 has a multiple offender provision as well, MCL 777.32(2). According to *Morson*, the "plain language of the statute . . . requires the sentencing court to assess the same number of points to multiple offenders." *Morson*, *supra* at 260. Furthermore, "there is no language in either statute to suggest that the multiple offender provision applies only when 'offenders' are charged with identical crimes." *Id.* at 260 n 11. In *Morson*, the defendant and a codefendant were tried separately and sentenced by different judges. *Id.* at 254 n 5. Our Supreme Court stated that, "[w]hen the sentencing court assesses points for the first offender, it must assess the 'highest number of points' that can be assessed under the statute." *Id.* at 260. Thus, under *Morson*, defendant in the case at bar had to be assessed the highest number of points under OVs 1, 2, and 3, because the record supports such a determination, and, when it comes

time to bring the other offenders to trial, the sentencing court will be able to score the same points under these OVs.

Defendant contends that under *People v Johnston*, 478 Mich 903, 904; 732 NW2d 531 (2007), he should not be assessed points because no other offenders were convicted of the same crime. Defendant's reliance on this case is misplaced. In *Johnston*, the sentencing court "scored [the] defendant's offense variables 1, 2, and 3 identically to the scores given to his co-defendants," however, our Supreme Court reasoned that because "[the] defendant was the only offender convicted of larceny from the person and conspiracy to commit larceny from the person," this "was not a 'multiple offender case' for either of these crimes. Accordingly, the multiple offender provision does not apply . . . ." *Id*. at 904. But *Johnson*, is distinguishable. Here, defendant was convicted of first-degree home invasion during which a homicide occurred. Though the other offenders had not yet been tried at the time of defendant's sentencing, evidence presented at trial suggests that they, too, were guilty of home invasion. This is not a case, like *Johnston*, where defendant would be the only person convicted of the crime. Therefore, it was proper for the sentencing court to give defendant 25 points for the discharge of a weapon at or toward a human being (OV 1), five points for the use of a pistol or shotgun (OV 2), and 100 points because the victim was killed (OV 3).

Defendant next argues that he should not have received any points under OV 10 (exploitation of vulnerability) because there is no indication that the offenders exploited the fact that the victim was asleep, i.e., defendant contends that the victim would have been shot even if he had he been awake. "[P]oints should be assessed under OV 10 only when it is readily apparent that a victim was 'vulnerable,' i.e., was susceptible to injury, physical restraint, persuasion, or temptation." *People v Cannon*, 481 Mich 152, 158; 749 NW2d 257 (2008). One of the several factors to be considered in deciding whether a victim was vulnerable is "whether the victim was asleep or unconscious." *Id.* at 158-159. Granting that "[t]he mere existence of [this factor] does not automatically render the victim vulnerable," *id.* at 159, it is clear that a late-night home invasion--with the intent to commit murder--is more easily accomplished, and the victim more susceptible to injury, when the victim is sleeping and unable to protect himself. Thus, the trial court's assessment of five points under OV 10 was not error.

Defendant next argues that the trial court improperly scored points for OV 19 (interference with the administration of justice) on the prosecution's theory that Horne was killed because of concern by defendant's companions, John Anthony Kitchen and "Fatty," over what Horne may have told police about a prior shooting at an after-hours social club. Defendant argues that such a motive does not implicate him, because he was convicted solely of home invasion. Under MCL 777.49(b) (OV 19) which addresses, inter alia, interference with administration of justice, an offender is assessed 15 points where "[t]he offender used force or the threat of force against another person or the property of another person to interfere with, attempt to interfere with, or that *results in the interference with the administration of justice . . .* ." *People v Barbee*, 470 Mich 283, 286; 681 NW2d 348 (2004) (emphasis added). In *Endres, supra,* this Court upheld the assessment of 15 points for a defendant who threatened the life of his victim, whom he knew "would be the primary witness against him if criminal charges were filed." *Endres, supra* at 421. This Court reasoned that "*[r]egardless of defendant's intent* in making his threats, the record supports the conclusion that those threats resulted in the

interference with the administration of justice, either by preventing the victim from coming forward sooner or affecting his testimony against defendant." *Id.* at 422 (emphasis added).

In this case, defendant's own statement to police indicates that he was with Kitchen and Fatty when either Kitchen or Fatty shot a man at the after-hours club. Defendant also indicated that he was aware that Horne went to the police, and he referred to Horne as a "snitch." Detective Karen Miller testified that as part of her investigation of the club shooting she had indeed interviewed Horne on January 10, 2007. In a photo lineup, Horne had identified Kitchen as a person who had been at the club that evening. Later that evening, Horne was killed. Even though the jury did not believe that defendant pulled the trigger, it did find him guilty of the home invasion that resulted in Horne's murder. As a result, Horne could not be a witness for the prosecution for the shooting at the club. Thus, there was evidence that regardless of defendant's intent, he participated in a home invasion that resulted in an interference with the administration of justice. It was not error for the trial court to assess 15 points for OV 19.

Finally, we conclude that the trial court scored defendant incorrectly on OV 14, for which defendant received ten points. First-degree home invasion is a Class B offense with a maximum of 20 years, MCL 750.110a. Defendant's prior record variables totaled ten points putting him at level C on the Class B grid, MCL 777.63. The OV points totaled 175, and thus, if ten points are subtracted for the improperly scored OV 14, the total is 165. This score still places defendant in OV Level VI of the Class B grid, resulting in 57 to 95 months minimum guidelines range, MCL 777.63. Thus, even though the guidelines were incorrectly scored, "the correct score would not change the guidelines recommended range, [therefore] remand for resentencing is not required." *People v Houston*, 261 Mich App 463, 473; 683 NW2d 192 (2004) rev'd in part on other grounds 473 Mich 399 (2005).

Affirmed.

/s/ Jane M. Beckering
/s/ Michael J. Talbot
/s/ Pat M. Donofrio